

Appendix K: Liability Exposure Generally for All Private Roads

The law governing liability exposure, known as Tort Law, is arcane, very complex, and is driven primarily by the facts of each separate incident in which someone is injured or suffers property damage. As a result, any general discussion of liability exposure for road associations and private road owners is necessary, but has limited utility.

The bottom line is that anyone having an ownership or maintenance and repair relationship or uses a private way to access their private property needs to have protection of liability insurance. Without it, one's property and financial security is continuously at risk. Even in those circumstances where there is statutory immunity, the cost of defending against a frivolous case can be substantial and liability insurance not only provides for protection against a judgment, but it also provides for the cost of defense. Given the relatively low cost of liability insurance for road associations, no association should be without it and no owner should expose themselves to liability by being active in a road association which does not carry liability insurance.

Generally, homeowners insurance will not provide coverage for the entire length of a private access road.

For private roads that do not have a formal road association, each owner of the road and each property that has easement rights and right of way rights over the road are potentially exposed to claims of liability or actual liability by anyone that may be hurt anywhere on the road because generally each property owner has the right to maintain the road and failure to adequately maintain it under that right may create liability. It certainly creates exposure to liability.

For a formal road association which has responsibility for maintaining the road, it has clear potential liability and exposure in a number of circumstances based on the facts of each incident in which someone is hurt. For example, the road may be perfectly maintained and smooth with no potholes, no sharp turns, good drainage, good visibility, except there is a tree right near the traveled surface. Under some circumstances, if a car hits that tree and someone is injured, the road association and its members and officers may be held negligent and liable for failure to remove the tree. Remember, that in each Tort liability trial, it is a jury that frequently determines if there was negligence and how much the damages are worth.

Under Maine's general liability law, if someone is injured while using a private road, everyone who is directly or indirectly associated with the road through ownership and/or maintenance are potentially liable. The owner is liable for owning a dangerous condition and, depending upon who is injured, is liable under some circumstances for not warning of a dangerous condition. The Road Association and people who maintain the road are also potentially liable for failure to do adequate maintenance. Abutting landowners could also face liability claims for a failure to warn and/or to maintain the road.

The nature of liability of the property owners varies depending upon how they use their property. For those owners who do not rent their property or do not have rental

units on their property, and do not charge anybody who comes to their house for the opportunity of being there, and/or do not sell things at their property, they may have only a duty to disclose a known dangerous condition. For those who receive monetary compensation from people who use their property such as renters, or use it for commercial purposes, have a much higher duty of care because the renters and/or buyers of goods or services are business invitees, and those property owners have an obligation to inspect and to discover and to cure any dangerous conditions. Business invitees are owed a duty of care much higher than anyone who is a simple visitor.

Most Road Association's liability insurance policies do not cover business invitees. Therefore, those who rent their property or dwelling units on the property may need to have their own liability insurance policy for the road as well as their own land. Owners on the road and the Road Association and the owner of the road generally do not have business invitee liability unless they are being paid directly.

People who may be using the road for recreational purposes, horseback riding, ATV's, motor cycles, etc. who are not associated with owners of the road or lots, they are treated very differently than users of the road who are guests or owners or traveling over the road for the purposes of going to a particular lot for a legitimate purpose. Since March 28, 1980, the owner of any land in Maine has complete immunity from liability for anyone who is injured on their land who was on the land for recreational purposes. This law is found in Title 14, Maine Revised Statutes Annotated §159-A. This immunity also protects the lot owners and Road Association.

The only exception to this complete recreational immunity is when the owner is being paid by the injured person to conduct the recreational activity on the owner's land.

This statutory immunity has been the subject matter of a number of court cases, and the Maine Supreme Judicial Court has always construed the statute provisions very broadly granting property owners immunity from liability for failing to keep their land safe for use for recreational activities. A sample court decision is Hafford v. Great Northern Nikoosa Corp. 687 A.2d, 967 (Me. 1996). Not only is there complete liability immunity for recreational use of someone else's land, the statute also provides that if a case is brought against the landowner by a recreational user who has not paid for the right to be there, that person will have to pay the landowner's legal fees and costs to get the case dismissed.

However, if a third party were injured as a result of these non-paying recreational activities, for example, someone using the road to visit a landowner is injured by an ATV rider, the injury to that third party could very well create liability on behalf of the road owner, Road Association and abutting owners for failure to adequately supervise the use of the road.

If the Road Association wishes to exclude the use of the road for horseback riding and ATV's, etc., it must provide notice to the potential users that those activities are not permitted. That notice can be oral or in writing or by signage. If it is by signs, it has to be at obvious locations where the recreational users would have their point of entry onto the road. If the road is adequately posted that it is closed to horseback riding and ATV's, then anyone who conducts that activity on the road would be trespassing. Since it is a private road, the trespassing limits would have to be enforced by the Road Association and/or lot owners as a civil matter. The police would not enforce the No

Trespassing. They have no authority to enforce no trespassing on private property because it is a civil matter, not a criminal matter.

The Road Association has basically two choices concerning horseback riding, for example, especially since the roads are usually narrow and winding, with limited sight distances. The Association could prohibit horseback riding on the road, which is the cleanest, most risk-free approach. A second alternative would be to post rules that must be followed by horseback riders, such as single file, no galloping. If you do allow horseback riding, you should also post on the road clear notice that motor vehicle operators need to be aware of the possibility of horseback riders on the road.

Posting signs and setting rules does not eliminate liability. It may help, but it may also be used against the owners and the road association. For example: if you knew the activity is potentially dangerous, why did you tolerate it?

Beginning on September 12, 2009, a Statutory Road Association, its officers, commissioner and anyone who undertakes activities for the Road Association has limited immunity from civil liability if the claims are brought by other owners or leasees of lots on the road. Under this new amendment to the law, people who are active in a road association now at least have some immunity for claims brought by neighbors.

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